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# The Silence of the Treaties: General International Law and the European Union

PAUL GRAGL\*

**ABSTRACT:** This article examines the silence of the EU Treaties on the implementation and functions of general international law in the European Union legal order. Given the EU's growing activity on the international plane which is subject to the rules of international law, it is remarkable that neither the Treaty drafters nor any subsequent Treaty amendments included an 'incorporation clause' in primary Union law that would clarify the legal status and rank of general international law within the EU. Regarding the functions of general international law, this article explores whether this silence has an impact on subsequent Member State practice in contravention of the Treaties, and the autonomous status of EU law, which provides for a comprehensive procedural 'toolbox' in order to redress infringements, and thus excludes the fall-back to countermeasures under international law between the Member States and the Union and between the Member States *inter se*. This article eventually concludes that the inclusion of an incorporation clause may have prevented the Court of Justice of the European Union from following a flexible approach towards international law, whilst the silence of the Treaties with respect to the functions of international rules remains irrelevant for the autonomy of EU law.

**KEYWORDS:** European Union law, general international law, reception and implementation of international law, monism and dualism, subsequent State practice, self-contained regimes, relationship between EU law and general international law

## I. Introduction

International legal norms may influence domestic legal orders in very different ways. Especially general international law<sup>1</sup> is of fundamental importance for the functioning of the international legal system. Due to its 'omnipresence' and its

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<sup>1</sup> In the context of this contribution, general international law refers to all international norms that are not 'treaty law,' especially customary international law and general principles of law.

seminal character in forming the background of the international legal order,<sup>2</sup> general international law and, in particular, its most basic rules, such as the prohibition of the use of force and State responsibility, have been assigned a substantial ‘constitutional quality’ within different municipal legal orders.<sup>3</sup> The implementation and functions of general international law within the EU’s legal system are nevertheless not entirely clear and remain somewhat obscure.

With respect to the question of implementation, attentive readers of the Union Treaties<sup>4</sup> might have noticed that these very Treaties remain entirely silent on this matter,<sup>5</sup> given that there is no provision comparable to Article 216 (2) Treaty on the Functioning of the European Union (TFEU), governing the legal effects of international treaties for the Union, on general international law. Unlike many constitutions of the Member States,<sup>6</sup> the Treaties lack an ‘incorporation clause’ which typically forms an integral part of the domestic legal orders of sovereign nation-States<sup>7</sup> and governs the implementation of international law within domestic law, and thus leave the further shaping of rules concerning the adoption and reception of general

<sup>2</sup> International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by *Martti Koskenniemi*, UN Doc. A/CN.4/L.682 (2006), para. 122.

<sup>3</sup> *Robert Uerpmann-Wittzack*, Völkerrechtliche Verfassungselemente, in: Armin von Bogdandy/Jürgen Bast (eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (2nd ed. 2009), 177, 178.

<sup>4</sup> Treaty on European Union, 9 May 2008, OJ 2008 C 115, 13 (consolidated version) (TEU); Treaty on the Functioning of the European Union, 26 October 2012, OJ 2012 C 326, 47 (consolidated version 2012) (TFEU).

<sup>5</sup> *Alessandra Gianelli*, Customary International Law in the European Union, in: Enzo Cannizzaro/Paolo Palchetti/Ramses A. Wessel (eds.), *International Law as Law of the European Union* (2012), 93, 93.

<sup>6</sup> Cf., e.g., Art. 25 Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*), BGBl. 1949, 1, as amended on 11 July 2012, BGBl. I, 1478; Art. 9 (1) Austrian Constitution (*Bundes-Verfassungsgesetz*), StGBI. Nr. 450, BGBl. Nr. 1; Art. 10 (1) Italian Constitution (*Costituzione della Repubblica Italiana*), Gazzetta Ufficiale n. 298 of 27 December 1947; Art. 2 (2) Constitution of the Hellenic Republic (*Σύνταγμα της Ελλάδας*), Official Gazette of the Hellenic Republic A'120 of 27 June 2008.

<sup>7</sup> *Kirsten Schmalenbach*, Die Europäische Union und das universelle Völkerrecht, in: Werner Schroeder (ed.), *Europarecht als Mehrebenensystem: Beiträge zum 7. Österreichischen Europarechtstag 2007* (2008), 67, 67–68; *Pieter Jan Kuijper*, “It Shall Contribute to ... the Strict Observance and Development of International Law ...”: The Role of the Court of Justice, in: Allan Rosas/Egils Levits/Yves Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (2013), 589, 589–590.

international law and decisions of international organisations to the Court of Justice of the European Union (CJEU) and its judges in Luxembourg.<sup>8</sup> Even though the European Parliament in 1997 called for a clear statement on the relationship between public international law and EU law to be written into the Treaties,<sup>9</sup> this call went utterly unheeded. The question remains, however, whether this silence represents a legal problem that has to be dealt with, or whether this silence allows the CJEU a more flexible approach towards the reception and implementation of international norms. Part II of this contribution will therefore determine the status within EU law of general international norms which bind the EU *vis-à-vis* the outside world, and what effort the EU legal order makes to ensure that the Union's international legal obligations are faithfully adhered to in the light of the absence of such a provision.

In contrast to the implementation of general international law within Union law, the question of the former's *function* within the latter is a completely different one. Seeing that the Treaties also remain silent on this matter, one might ask if and to what extent the norms of general international law can be drawn upon, either directly or by analogy, to fill any gaps which EU law leaves with regard to the relations between the EU and its Member States as well as between those Member States *inter se* within the scope of application of the Treaties. While most constitutions of federal States proclaim to exhaustively regulate intra-federal legal relations,<sup>10</sup> leaving no room for the application of general international law (except where the federal constitution permits it)<sup>11</sup>, the quasi-federal legal order of the EU is different, as it simply does not

<sup>8</sup> Pieter Jan Kuijper, Customary International Law, Decisions of International Organisations and other Techniques for Ensuring Respect for International Legal Rules in European Community Law, in: Jan Wouters/André Nollkaemper/Erika de Wet (eds.), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (2008), 87, 87.

<sup>9</sup> European Parliament, Resolution on the relationships between international law, Community law and the constitutional law of the Member States, 27 October 1997, OJ 1997 C 325, 26, para. 14.

<sup>10</sup> Cf. Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 1, 14, 133; BVerfGE 34, 216, 53; Stefan Talmon, Die Grenzen der Anwendung des Völkerrechts im deutschen Recht, *JuristenZeitung* 68 (2013), 12, 16.

<sup>11</sup> Cf. Art. III sec. 2 Constitution of the United States of America, giving the US Supreme Court jurisdiction over interstate disputes, which applied customary international rules to resolve border disputes (e.g. US Supreme Court, *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838)), or disputes regarding water rights (e.g. US Supreme Court, *Kansas v. Colorado*, 185 U.S. 125 (1902)) between two states. Cf. also Art. 15a (3) Austrian Constitution, stating that the principles of the international law of treaties are applicable to arrangements between the federation and the states (e.g. Constitutional Court (*Verfassungsgerichtshof*), VfGH A13/96, VfSlg 15.309).

exhaustively regulate the relations between the Member States. Consequently, certain Member States which might have an interest in resolving legal disputes with either other Member States or the Union itself not on the basis of EU but general international law could take advantage of this gap to the detriment of EU law. Recourse to countermeasures and the instruments provided for by general international law in order to respond to violations of international obligations could undermine the more sophisticated dispute settlement mechanisms enshrined in the EU Treaties. For instance, even though Article 7 Treaty on European Union (TEU) has been introduced into the Treaties to respond to serious breaches of fundamental Union values *after* the so-called ‘EU-XIV Sanctions’ had been imposed against Austria in the year 2000, this latter example could encourage the Member States to circumvent EU law and to rely on general international law to settle their disputes. Especially the *Kadi* saga is living proof that, for example, the United Kingdom – for the obvious reason of efficiently combating international terrorism – would rather see international law prevail over European Union law at the end of the day in particular instances.<sup>12</sup> Part IV therefore examines whether recourse to the rules of general international law besides the EU’s own dispute settlement mechanisms is permissible and whether such a step constitutes in fact a practical and viable option for the Member States.

Part V eventually summarises the findings of this contribution and draws conclusions on what the silence of the Treaties on both the implementation and the function of general international law within the EU legal order means for the latter’s proper functioning.

## II. The External Perspective: The Question of Implementation

### A. Strict Observance or Indifference?

The silence of the Treaties on the way general international law may or may not be received within the EU’s legal order is not a mere hypothetical problem since the Union interacts with the outside world and therefore has to abide by the rules of the

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<sup>12</sup> Court of First Instance (CFI), Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, 2005 ECR II-3649, para. 217.

international community. At the outset, it is of course obvious that the Union was indisputably conceived as an international organisation, which did not require a comprehensive and clear provision on its relationship with the ‘rest’ of international law. As an – admittedly autonomous – subsystem of the international legal order, the EU system hence remains part of the ‘primeval soup’ of general international law (*lex generalis*) and constitutes a closed and specialised legal order within the universal system (*lex specialis*).<sup>13</sup> However, as the distance from the ‘maternal’ international legal order grew and the European Union became more ‘domestic’ in nature, a specification on the role of general international law within Union law may have been useful.

The Lisbon Treaty<sup>14</sup> eventually introduced two noteworthy references to general international law in the Treaties, namely Articles 3 (5) and 21 TEU which set a pivotal agenda for the EU’s relationship with international law and the wider world.<sup>15</sup> These provisions flesh out the Union’s commitment to comply with and respect general international law, and therefore to not ignore the international legal order as ‘the law of the others.’<sup>16</sup> Yet, these provisions nevertheless fail to answer the question how general international law is to be implemented within European Union law, which prevents us from considering these provisions as ‘incorporation clauses.’ One could presume that the absence of such a provision may mirror the Treaty framers’ indifference toward international law. There is *per se* nothing wrong with such indifference or even a dualist stance towards international law, but the downplaying of the relevance and applicability of international law could indeed be a cause for concern.<sup>17</sup> One may thus ask why this is so and whether that failure in codification could lie in the idiosyncratic position which general international law holds within Union law.<sup>18</sup> But maybe there is more to that plain reason than meets the eye:

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<sup>13</sup> *Schmalenbach* (note 7), 74.

<sup>14</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, OJ 2007 C 306, 01.

<sup>15</sup> *Piet Eeckhout*, EU External Relations Law (2011), 96.

<sup>16</sup> *Schmalenbach* (note 7), 68.

<sup>17</sup> *Jan Klabbers*, Völkerrechtsfreundlich? International Law and the Union Legal Order, in: Panos Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (2011), 95, 97.

<sup>18</sup> *Gianelli* (note 5), 95.

Perhaps the Treaty drafters thought that ‘loose lips might sink ships’<sup>19</sup> and therefore had sensible reasons to omit any explicit reference to the status of general international law within the EU legal order. The subsequent section will try to provide an answer to these questions.

### B. From Initial Openness to Practical Flexibility

As *Aristotle* said quite rightly, it is obvious that it is inconceivable for anybody to live outside society or to have no need of it because of self-sufficiency.<sup>20</sup> The same is true of the European Union and its embedment into the international legal order. Lacking a provision which would somehow govern the EU’s relationship with general international law and the latter’s implementation in the former, the CJEU necessarily had to fill these gaps through its jurisprudence in order to be able to interact with the ‘outside world.’ In this vein, the provision on the reception of general international law within Union law, parallel to that of treaty norms (Article 216 (2) TFEU), can now be found in the continuously developing case law of the Luxembourg Court.

The Court’s early case law was informed by openness and respect, and – especially in cases relating to the exercise of jurisdiction on the basis of the territoriality principle<sup>21</sup> – it applied customary international law almost as a matter of course.<sup>22</sup> The CJEU subsequently recognised the binding force of international law as a source of EU law, for instance, when faced with questions of interpreting treaties or

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<sup>19</sup> This phrase was used on United States propaganda posters during World War II to deter people from careless talk in public about ship movements.

<sup>20</sup> *Aristotle*, *Politics*, Book I, chapter 2.

<sup>21</sup> *Cf.*, e.g., European Court of Justice (ECJ), Case 48/69, *Imperial Chemical Industries Ltd. v. Commission*, 1972 ECR 619; ECJ, Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85, 129/85, *A. Ahlström Osakeyhtiö and Others v. Commission*, 1988 ECR 5193; CFI, Case T-102/96, *Gencor Ltd. v. Commission*, 1999 ECR II-753.

<sup>22</sup> *Kuijper* (note 8), 595.

international decisions;<sup>23</sup> in particular in specific areas such as the law of the sea;<sup>24</sup> and in determining the precise meaning of international legal notions referred to by Union law, *inter alia*, State responsibility<sup>25</sup> and the immunity of international organisations.<sup>26</sup> The most explicit expression toward the binding force and implementation of general international law, however, can be found in the seminal *Racke* case where the Luxembourg Court ruled that the EU must not only respect international law in the exercise of its powers in principle, but that the rules of customary international law are binding upon the Union institutions and form part of the EU legal order. Consequently, every piece of EU secondary legislation is also required to be in compliance with customary international law.<sup>27</sup> This quite progressive position<sup>28</sup> in *Racke* was then complemented by the decision in *Opel Austria* through which the customary principle of protection of legitimate expectations, as codified in Article 18 Vienna Convention on the Law of Treaties (VCLT),<sup>29</sup> was basically transformed into a general principle of EU law.<sup>30</sup> Until this point, the Court's case law appears to be based on the notion that general

<sup>23</sup> Cf., e.g., ECJ, Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd. and Others*, 1994 ECR I-3087, para. 43; ECJ, Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport*, 2008 ECR I-4057, paras. 54–66; ECJ, Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010 ECR I-1289, para. 41.

<sup>24</sup> Cf., e.g., ECJ, Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp*, 1992 ECR I-6019, paras. 9–10; ECJ, Case C-405/92, *Etablissements Armand Mondiet SA v. Armement Islais SARL*, 1993 ECR I-6133, paras. 13–14; ECJ, Case C-37/00, *Herbert Weber v. Universal Ogden Services Ltd.*, 2002 ECR I-2013, para. 34.

<sup>25</sup> Cf., e.g., ECJ, Case C-63/09, *Axel Walz v. Clickair SA*, 2010 ECR I-4239, paras. 27–28.

<sup>26</sup> Cf., e.g., ECJ, Case C-113/07, *SELEX Sistemi Integrati SpA v. Commission and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)*, 2009 ECR I-2207, para. 110 (opinion of AG Trstenjak).

<sup>27</sup> ECJ, Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, 1998 ECR I-3655, paras. 45–46.

<sup>28</sup> *Jan Wouters/Dries van Eeckhoutte*, Giving Effect to Customary International Law through European Community Law, in: Jolande M. Prinssen/Annette Schrauwen (eds.), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (2002), 183, 202 and 210.

<sup>29</sup> Vienna Convention on the Law of Treaties, 13 May 1969, UNTS 1155, 331 (VCLT).

<sup>30</sup> CFI, Case T-115/94, *Opel Austria GmbH v. Council*, 1998 ECR II-2739, para. 93.



international law is directly applicable within EU law – in accordance with a more or less monist approach.<sup>31</sup>

The European Union's current practice in the area of general international law, however, could – colloquially speaking – be considered schizophrenic, as the seemingly functioning relationship between Union law and general international law appears to have come to an end in the *Kadi* cases,<sup>32</sup> which are usually considered the 'dualist' breaking-point in a hitherto 'monist' liaison.<sup>33</sup> One might ask whether a classical 'incorporation clause' on general international law could have prevented the CJEU from following the flexible approach it applied in the *Kadi* cases and thus from protecting fundamental rights – albeit at the price of a consistent approach towards international law. In *Kadi I*, the CJEU in fact goes great lengths to highlight that the "bridges"<sup>34</sup> between the international legal order and the EU remain intact. The Court accepts the primacy of Security Council resolutions in international law and emphasises that the EU's obligations under international law remain valid as it certainly is bound by international norms<sup>35</sup> – unless, of course, these international obligations fall foul of the Union's own rights standards, prompting the CJEU to put up a 'wall' and thus to perform a normative closure *vis-à-vis* international law.<sup>36</sup>

But the Court's refusal to give full effect to international law in the *Kadi* cases is nevertheless not arbitrary or whimsical; on the contrary, it is required by the principle of the rule of law and to be welcomed as a substantive entitlement of fundamental

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<sup>31</sup> Allan Rosas, The European Court of Justice and Public International Law, in: Wouters/Nollkaemper/de Wet (eds.) (note 8), 71, 80.

<sup>32</sup> ECJ, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008 ECR I-6351 (*Kadi I*); ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v. Yassin Abdullah Kadi* (*Kadi II*), available via: <http://curia.europa.eu/juris/liste.jsf?num=C-584/10&language=de> (accessed on 3 March 2015).

<sup>33</sup> Cf., e.g., Gráinne de Búrca, The European Court of Justice and the International Legal Order after *Kadi*, Harvard International Law Journal 51 (2010), 1, 44 *et seq.*

<sup>34</sup> Achilles Skordas, Völkerrechtsfreundlichkeit as Comity and the Disquiet of Neoformalism: A Response to Jan Klabbers, in: Koutrakos (ed.) (note 17), 115, 139.

<sup>35</sup> ECJ, *Kadi I* (note 32), paras. 290–297.

<sup>36</sup> Skordas (note 34), 137–138.

rights.<sup>37</sup> By declaring that the listing and de-listing procedure of persons being suspected of terrorist activities on the UN level does not live up to the level of fundamental rights protection as guaranteed by judicial review,<sup>38</sup> the CJEU's final judgment in *Kadi II* could be seen as an EU countermeasure against the apparently illegal (yet valid) Security Council measure in question.<sup>39</sup> One may therefore speculate that if an 'incorporation clause' had existed at the time *Kadi* was decided, the CJEU might have been misled to blindly take into account international law as it stood back then in the shape of the Security Council's resolutions and, paradoxically, to thereby violate international law at the same time, namely international human rights.

### C. A Monist Reinterpretation in Place of an Incorporation Clause

In the light of the foregoing findings, one could consequently argue that it was exactly the continuing failure to include a norm parallel in wording and content to Article 216 (2) TFEU on the implementation of general international law into the Treaties that enabled the Court to decide the *Kadi* cases in the way it did: One can speculate that even though the existence of an explicit incorporation clause would be welcome from the viewpoint of legal theory and consistency (as this would have allowed for an obvious and continuing open approach in the CJEU's case law), it was the very absence of such a provision which granted the Court the flexibility required to guarantee the protection of fundamental rights. This would mean that, in practice, the silence of the Treaties on the implementation of general international law makes an enormous difference with regard to the outcome of concrete cases.

This is all the more confirmed by the Court's settled case law in which it does in fact comply with general international law despite the absence of an incorporation clause. In *Kadi II*, for example, the CJEU holds that "the competent European Union authority must take due account of the terms and objectives of the resolution

<sup>37</sup> N. Türküler Isiksel, Fundamental Rights in the EU after *Kadi* and *Al Barakaat*, European Law Journal 16 (2010), 551, 568.

<sup>38</sup> ECJ, *Kadi II* (note 32), paras. 133–134.

<sup>39</sup> Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions (2011), 174–177.

concerned and of the relevant obligations under that Charter [Charter of the United Nations] relating to such implementation”<sup>40</sup> – notwithstanding the notable requirement under Article 47 Charter of Fundamental Rights<sup>41</sup> that the EU judicature verify the allegations underlying the reasons provided by the Security Council.<sup>42</sup> By acknowledging the importance of international peace and security yet requiring human rights standards to be safeguarded in its pursuit, the Court not only sidestepped the logically fallacious confrontation of security *versus* human rights,<sup>43</sup> but also succeeded in implementing general international law, namely basic human rights norms, without relying on an incorporation clause.<sup>44</sup> The CJEU has thus shown that taking international law seriously is not tantamount to an unqualified deference to a seriously flawed regime.<sup>45</sup> In fact, the *Kadi* saga did not undermine the UN system in particular and international law in general, but strengthened their transparency<sup>46</sup> and legitimacy, and thus the unity of domestic and international law in a sense which is comparable to that of *Kelsenian* theory.<sup>47</sup> This means that not only is an incorporation clause unnecessary for the EU’s compliance with international

<sup>40</sup> ECJ, *Kadi II* (note 32), para. 106.

<sup>41</sup> Charter of Fundamental Rights of the European Union, 7 December 2000, OJ 2000 364, 1 (EU Charter).

<sup>42</sup> ECJ, *Kadi II* (note 32), para. 119.

<sup>43</sup> *Arman Sarvarian*, The *Kadi II* Judgment of the Court of Justice of the European Union: Implications for Judicial Review of UN Security Council Resolutions, in: Matej Avbelj/Filippo Fontanelli/Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (2014), 95, 101.

<sup>44</sup> One might counter this argument by stating that all the Court did was enforcing Art. 47 EU Charter, which is – after all – a norm of EU law. However, the right to an effective remedy and a fair trial as enshrined in this provision is well established in and thus inspired by global and regional human rights law; e.g., Art. 14 International Covenant on Civil and Political Rights, 19 December 1966, UNTS 999, 171, and Arts. 6 and 13 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005. Cf. *Dinah Shelton*, Sources of Article 47 Rights, in: Steve Peers *et al.* (eds.), *The EU Charter of Fundamental Rights: A Commentary* (2014), 1200, 1200–1209.

<sup>45</sup> *Mattias Kumm*, Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism, in: Matej Avbelj/Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012), 39, 62–63.

<sup>46</sup> *Eileen Denza*, Placing the European Union in International Context: Legitimacy of the Case Law, in: Maurice Adams *et al.* (eds.), *Judging Europe’s Judges* (2013), 175, 186–187.

<sup>47</sup> *Hans Kelsen*, *Principles of International Law* (1952), 424–428.

law, but also that the Court's case law, despite the inexistence of such a clause, can be interpreted in a rather monist and international law-friendly way.

Furthermore, a provision which explicitly designated the role of general international law in the 'constitutional' basis of the European Union and thus labelled its legal order as either 'monist' or 'dualist' could not exhaustively refer to all the different functions general international law has (for example, as an interpretative instrument or a potential yardstick for the invalidity of EU law). In other words, the diversity of roles international law can have would not allow for a single and satisfying provision in the EU Treaties. "Plurality by necessity," as *Gianelli* puts it, therefore seems to describe the intricate relationship between general international law and the EU system in the best manner.<sup>48</sup>

Yet, even though Article 3 (5) TEU does not define the precise legal status of general international law within the Union's hierarchy of norms,<sup>49</sup> its specific wording may imply that international norms are incorporated into the EU's legal order as such, and not as 'international law of the European Union' – in other words, it remains international law and continues to be a source of law of its own besides 'genuine' EU law.<sup>50</sup> In the long run, the formula used in Article 3 (5) TEU will prove useful short of being a proper incorporation clause, as it simply mentions the Union's obligations "[i]n its relations with the wider world,"<sup>51</sup> and reminds the Court of the EU's obligations under general international law, as identified in *Racke*.<sup>52</sup>

### III. The Internal Perspective: The Question of Function

#### A. The Various Functions of General International Law within EU Law

<sup>48</sup> *Gianelli* (note 5), 97–98.

<sup>49</sup> *Wouters/van Eeckhoutte* (note 28), 186.

<sup>50</sup> *Astrid Epiney*, Die Bindung der Europäischen Union an das allgemeine Völkerrecht, *Europarecht-Beiheft* 2 (2012), 25, 31.

<sup>51</sup> *Gianelli* (note 5), 98.

<sup>52</sup> ECJ, *Kadi II* (note 32), para. 103, and ECJ, Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, 2011 ECR I-13755, para. 101.

In contrast to the question of whether and how general international law is being received and implemented within the European Union legal order, this chapter enquires whether general international law can be used in a very particular function because of the absence of a provision on the EU-internal role of international law. At the outset, it should therefore be underlined that the existence (or the non-existence) of an implementation clause may well influence the role and functions of general international law within a given domestic legal order, but that such influence between an implementation clause and the domestic functions of international law need not necessarily exist. The example of the Federal Republic of Germany demonstrates that such a nexus between implementation and function should not be presumed lightly: Although Article 25 German Constitution (*Grundgesetz*) proclaims in a monistic way that “[t]he general rules of international law shall be an integral part of federal law,” and thus binds Germany *vis-à-vis* the outside world, this does not permit conclusions as to the applicability of general international law within the intra-federal relations between the German *Länder* or between them and the federal government. In this vein, the Federal Constitutional Court (*Bundesverfassungsgericht*) explicitly stated that these relations are exhaustively regulated by the Constitution and that general international law cannot even be applied analogously or subsidiarily in this respect.<sup>53</sup>

The question, however, whether and to what extent general international law is applicable within domestic law and between federal entities, is largely determined by historical facts.<sup>54</sup> *Heinrich Triepel* aptly acknowledged this circumstance when he argued that the existence and continuing validity of international legal elements were more likely in States originating in federations of former sovereign States, formerly interacting under international law, than in those States which only became federations after the collapse of a unitary State. The decisive element is that, in the former case, the federation only came into existence through express acts of sovereign States, which decided to relinquish their sovereignty, either partly or entirely, and to subject themselves to a newly formed supreme entity. In this case, it only makes sense that these States ‘bring along’ elements of international law into the new federation

<sup>53</sup> Cf. Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 1, 14, 133; BVerfGE 34, 216, 53.

<sup>54</sup> *Albert Bleckmann*, *Grundgesetz und Völkerrecht* (1975), 339.

in order to keep the loss of sovereignty to the minimum – which is necessary to become part of the newly formed federation.<sup>55</sup>

The European Union, of course, is neither a State nor a federal State. It rather is a federal union,<sup>56</sup> for the want of a better term, since all Member States still have the option to withdraw from the Union according to international law<sup>57</sup> and Article 50 TEU, respectively. But be that as it may, the overall structure of the EU comes very close to *Triepel's* example of a federal union of sovereign States in which general international law still plays a role. This is evidenced by the fact that the CJEU widely uses customary international law as providing rules of interpretation,<sup>58</sup> most importantly to construe treaties with third countries to which the Union is a party,<sup>59</sup> and secondary EU law giving effect to such treaties.<sup>60</sup> The Court has, however, not even once applied the VCLT in its manifestation as customary international law<sup>61</sup> when interpreting the EU Treaties themselves.<sup>62</sup> Besides its interpretative function, the Court also uses general international law in a gap-filling role to close lacunae in specific Union law areas, for instance regarding the registration of seafaring vessels,<sup>63</sup>

<sup>55</sup> *Heinrich Triepel*, *Völkerrecht und Landesrecht* (1899), 174.

<sup>56</sup> *Kalypso Nicolaïdis*, “We, the Peoples of Europe ...”, *Foreign Affairs* 83 (2004), 97, 102 and 105.

<sup>57</sup> *Pavlos Eleftheriadis*, *Federalism and Jurisdiction*, in: *Elke Cloots/Geert de Baere/Stefan Sottiaux* (eds.), *Federalism in the European Union* (2012), 45, 46.

<sup>58</sup> *Cf.*, e.g., *Kuijper* (note 8), 92–93; *Wouters/van Eeckhoutte* (note 28), 191–194.

<sup>59</sup> *Cf.*, e.g., the case law on the use of Art. 31 (1) VCLT in ECJ, Case C-312/91, *Procedural Issue Relating to a Seizure of Goods Belonging to Metalsa Srl*, 1993 ECR I-3751, para. 12; ECJ, Case C-416/96, *Nour Eddine El-Yassini v. Secretary of State for the Home Department*, 1999 ECR I-1209, para. 47; ECJ, Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, 2001 ECR I-8615, para. 35.

<sup>60</sup> *Cf.*, e.g., ECJ, Case C-61/94, *Commission v. Germany (International Dairy Arrangement)*, 1996 ECR I-3989, para. 52; ECJ, *Poulsen* (note 23), paras. 9 and 11.

<sup>61</sup> *Richard Gardiner*, *Treaty Interpretation* (2008), 121.

<sup>62</sup> *Cf.* CFI, Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03, and T-98/03, *SP SpA and Others v. Commission*, 2007 ECR II-1357, para. 58: “The reference to international law, and in particular to Articles 54 and 70 of the Vienna Convention, fails to have regard to the sui generis nature of the Community legal order [...]. The indivisibility of the Community legal order and the *lex specialis* to *lex generalis* relationship between the ECSC and EC Treaties mean that the consequences of the expiry of the ECSC Treaty are not governed by the rules of international law but must be assessed in the light of the provisions existing within the Community legal order”.

<sup>63</sup> ECJ, Case C-221/89, *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd. and Others*, 1991 ECR I-3905, para. 17.

the conditions for granting nationality,<sup>64</sup> or whether work carried out on the Netherlands section of the continental shelf can be regarded as having been carried out within the jurisdiction of the Netherlands proper.<sup>65</sup> In all these cases, the CJEU found that it fell to the Member States to regulate these areas, albeit with due regard to Union law, in accordance with the rules of general international law.

It thus becomes evident that EU law does not exhaustively govern the relations between the Member States *inter se* and between the Member States and the EU. Beyond the scope of application of the Treaties, those relations certainly continue to be subject to the rules of general international law, as the example of the *Jurisdictional Immunities* case before the International Court of Justice (ICJ) clearly illustrates: When Germany brought a case against Italy for failing to respect its jurisdictional immunity as a sovereign State, Germany asserted in its application that, although the present case involves two EU Member States, the CJEU has no jurisdiction to entertain it, since the dispute is not governed by any of the jurisdictional clauses in the Treaties. Moreover, “[o]utside the specific framework [...] the [Member States] continue to live with one another under the régime of general international law.”<sup>66</sup> Obviously, the ICJ did not engage in this matter, as the final judgment does not show any references to the CJEU or its potential jurisdiction in this case.<sup>67</sup>

Yet, it remains questionable and controversial whether and to what extent customary international law can be used within the scope of application of the Treaties where those Treaties remain silent. The next sections will therefore examine whether EU law could indeed be supplemented by general international law or whether the latter may even be used as a subsidiary normative layer in intra-Union relations and thus set aside the more specific rules of Union law.

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<sup>64</sup> ECJ, Case C-369/90, *Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria*, 1992 ECR I-4239, para. 10.

<sup>65</sup> ECJ, Case C-37/00, *Herbert Weber v. Universal Ogden Services Ltd.*, 2002 ECR I-2013, paras. 31–34.

<sup>66</sup> ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), Application by Germany of 23 December 2008, para. 6, available at: <http://www.icj-cij.org/docket/files/143/14923.pdf> (accessed on 15 January 2015).

<sup>67</sup> ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99.

### B. Subsequent Member State Practice

We should bear in mind that the legal basis of the European Union's legal order are treaties, not a 'genuine' domestic constitutional document, whose relationship with general international law is governed by international law itself. There is no doubt that, from a public international law point of view, all major revision treaties of the last decades, including the Lisbon Treaty, were amendments of multilateral treaties under the legal regime of Articles 39 to 41 VCLT. Article 39 VCLT states that a treaty may be amended by an agreement between all the parties, to which the international rules on the conclusion of treaties apply. And since the international regime of treaty amendment is informed by utmost flexibility, this default rule is of residual nature<sup>68</sup> and can therefore be easily set aside by the parties when concluding the original treaty in the way they wish.<sup>69</sup> Article 48 TEU on the revision procedure of the Union Treaties is living proof of that.

Yet, this also entails that the founding treaties remain subject to derogation by subsequent practice, according to international law<sup>70</sup> and within the meaning of Article 31 (3)(b) VCLT. Since the words of the treaty in question are given a (more) precise meaning by deeds of the treaty parties,<sup>71</sup> subsequent practice "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."<sup>72</sup> Most importantly, the rules of treaty interpretation in the context of subsequent practice are also applicable to the constituent instruments of international organisations, by virtue of Article 5 VCLT, which has also been confirmed by the ICJ in its opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.<sup>73</sup> It therefore seems plausible that the EU Member States

<sup>68</sup> Jutta Brunnée, Treaty Amendments, in: Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (2012), 347, 350.

<sup>69</sup> Bruno de Witte, Treaty Revision Procedures after Lisbon, in: Andrea Biondi/Piet Eeckhout/Stefanie Ripley (eds.), *EU Law after Lisbon* (2012), 107, 108.

<sup>70</sup> Gianelli (note 5), 96.

<sup>71</sup> Gardiner (note 61), 225.

<sup>72</sup> ICJ, *Kasikili/Sedudu Island* (Botswana v. Namibia), Judgment of 13 December 1999, ICJ Reports 1999, 1045, para. 49.

<sup>73</sup> ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 66, para. 19.



could, in fulfilling their obligations under the Union Treaties,<sup>74</sup> alter the meaning of EU primary law *via* subsequent practice.

The Luxembourg Court, however, cannot accept this view. It objected to the concept of derogation from the Treaties by subsequent Member State practice, and ruled that the Treaties “can only be modified by means of the amendment procedure carried out in accordance with Article [48 TEU].”<sup>75</sup> Consequently, “a mere practice [...] cannot derogate from rules laid down in the treaty. Such a practice cannot therefore create a precedent binding on [Union] institutions with regard to the correct legal basis.”<sup>76</sup> Given that the European Union “constitutes a new legal order of international law,”<sup>77</sup> every Member State act or practice in disregard of EU law would contribute to the disintegration of the Union system.<sup>78</sup> Consequently, the CJEU shortly thereafter not only dropped the reference to “international law” in *Costa v. E.N.E.L.*<sup>79</sup> and thereby further substantiated the Union’s legal autonomy towards general international law, but also confirmed that “a mere practice cannot override the provisions of the Treaty.”<sup>80</sup> This may be true from the perspective of EU law. Under international law, however, the question nonetheless remains whether the Member States still have the legal power to jointly act in non-compliance with Article 48 TEU in order to derogate from the Treaties. To put it bluntly, we should ask whether the Member States – in a twist of bitter irony – may place themselves outside the boundaries of EU law in order to change the EU legal order from the ‘outside.’<sup>81</sup>

The fact that EU primary law rests on international agreements concluded between the Member States speaks in favour of this view, in particular given the

<sup>74</sup> Oliver Dörr, Article 31, in: Oliver Dörr/Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2012), para. 80.

<sup>75</sup> ECJ, Case 43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 1976 ECR 455, para. 58.

<sup>76</sup> ECJ, Case 68/86, *United Kingdom v. Council*, 1988 ECR 855, para. 24.

<sup>77</sup> ECJ, Case 26/62, *van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 ECR 1, 10.

<sup>78</sup> ECJ, Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 ECR 585.

<sup>79</sup> *Ibid.*, 593.

<sup>80</sup> ECJ, Case C-327/91, *France v. Commission*, 1994 ECR I-3641, para. 36.

<sup>81</sup> Hans-Joachim Cremer, Art. 48 EUV, in: Christian Calliess/Matthias Ruffert (eds.), *EUV/AEUV-Kommentar* (2011), para. 20.

Member States' option to act on the basis of an *actus contrarius* or *actus modificans* to the Treaties,<sup>82</sup> and thus to disintegrate the Union at their discretion. Beyond that, the EU is not a sovereign subject of international law, which exists independently from the will of the Member States, or which has acquired international sovereignty from them. As a consequence, we might – provocatively – conclude that the EU merely exists since the Member States permit it to exist.<sup>83</sup> The Member States retained an untouched core of independence<sup>84</sup> and thus never surrendered their legal power to conjointly undo the European project.<sup>85</sup> This view is also in line with the general consent rule of Article 54 (b) VCLT which states that “[t]he termination of a treaty [...] may take place [...] at any time by consent of all the parties after consultation with the other contracting States” (emphasis added). Since this provision displays the contracting parties’ joint right and power under general international law to dispose of any treaties at their will, they may not only terminate the first treaty by concluding another treaty, but also by contravening subsequent practice governed by general international law.<sup>86</sup> However, one might object to this view that States parties to an agreement could agree that their relationship shall not be governed by international law and thence be removed from the scope of the international law of treaties (according to Article 2 (1)(a) VCLT), for example when forming a new and indissoluble federal State.<sup>87</sup> The European Union could provide such an example, as the process of European integration is purported to be irreversible.<sup>88</sup>

<sup>82</sup> *Rupert Scholz*, Europäische Union und deutscher Bundesstaat, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 12 (1993), 817, 818; *Karl Doebring*, Staat und Verfassung in einem zusammenwachsenden Europa, *Zeitschrift für Rechtspolitik* 26 (1993), 98, 99.

<sup>83</sup> *Trevor C. Hartley*, International Law and the Law of the European Union – A Reassessment, *British Yearbook of International Law* 22 (2001), 1, 8.

<sup>84</sup> *Ulrich Everling*, Reflections on the Structure of the European Union, *Common Market Law Review* 29 (1992), 1053, 1076.

<sup>85</sup> *Jochen Frowein*, Das *Maastricht-Urteil* und die Grenzen der Verfassungsgerichtsbarkeit, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 54 (1994), 1, 10; *Rudolf Bernhardt*, Europäisches Gemeinschaftsrecht und das Recht internationaler Organisationen: Gemeinsamkeiten und Unterschiede, in: Gerhard Hafner *et al.* (eds.), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (1998), 25, 33–34.

<sup>86</sup> *Anthony Aust*, *Modern Treaty Law and Practice* (2007), 254.

<sup>87</sup> *Thomas Giegerich*, Article 54, in: Dörr/Schmalenbach (eds.) (note 74), para. 48.

<sup>88</sup> *Peter Herzog*, Article 240 TEC, in: Hans Smit/Peter Herzog (eds.), *The Law of the European Union*, Vol. 6 (2008), 240.03–240.04.

Nonetheless, as mentioned before, it remains undisputed that the Union's legal basis is founded on international treaties and that the EU is not a federal State which means that the Member States could in fact supersede the EU Treaties' legal effects *via* contravening subsequent practice. Of course Union law tries to bar the Member States from changing EU primary law by legal avenues other than those governed in Article 48 TEU.<sup>89</sup> Subsequent practice cannot play an important role in the various means of interpretation employed by the CJEU<sup>90</sup> simply because it is the Treaties that shall govern the practice of the Member States, and not *vice versa*.<sup>91</sup> Any subsequent practice in contravention of Article 48 TEU certainly constitutes a watering down of the EU legal order and is therefore regarded as a threat to the uniformity and autonomy of Union law.<sup>92</sup>

Moreover, the Member States apparently prefer the explicit rules of EU law on treaty revision over those of international law: The 'Euro crisis' has shown that the Member States are careful to follow EU law when amending the Treaties (in this case, Article 136 (3) TFEU which allows for the establishment of a financial stability mechanism),<sup>93</sup> even if recourse to general international law would have been possible. Lastly, one has to wonder why, if the Member States actually disagreed with the CJEU's findings that Article 48 TEU constituted the sole way to amend the Treaties, they would not have used the repeated occasions of Treaty revision to "set the record straight" in a way they intended.<sup>94</sup> It can therefore be concluded that with regard to subsequent State practice, recourse to international law and subsequent destabilisation of Union law is practically irrelevant. Theoretically, however, it is still

<sup>89</sup> *Cremer* (note 81), para. 21.

<sup>90</sup> *Georg Nolte*, Jurisprudence under Special Regimes Relating to Subsequent Agreements and Subsequent Practice: Second Report for the ILC Study Group on Treaties over Time, in: Georg Nolte (ed.), *Treaties and Subsequent Practice* (2013), 210, 301.

<sup>91</sup> *Gordon Slynn*, The Use of Subsequent Practice as an Aid to Interpretation by the Court of Justice of the European Communities, in: Roland Bieber/Georg Ress (eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts* (1987), 137, 138.

<sup>92</sup> *Nial Fennelly*, Legal Interpretation at the European Court of Justice, *Fordham International Law Journal* 20 (1996), 656, 672.

<sup>93</sup> European Council, Decision of 25 March 2011 Amending Article 136 of the Treaty of the Functioning of the European Union with Regard to a Stability Mechanism for Member States Whose Currency is the Euro (2011/199/EU), OJ 2011 L 91, 1.

<sup>94</sup> *J. H. H. Weiler*, The Autonomy of the Community Legal Order – Through the Looking Glass, *Harvard International Law Journal* 37 (1996), 411, 433.

within the Member States' power to rely on general international law in order to act in violation of these rules. This could supposedly be one of the reasons why the drafters of the EU Treaties did not include any reference to the function of general international law within the Union's legal order. This conclusion remains, however, hypothetical and therefore ultimately unprovable.

### C. 'Self-Contained Regimes' and Countermeasures

Another reason for the absence of an explicit reference to the functions of customary international law within EU law could be the deliberate derogation from custom by creating a new organisation, namely the Union, on the basis of international agreements. Article 3 (5) TEU certainly commits the EU to respect international law in its relations with non-Member States, as well as other subjects of international law, but it does not oblige the Union to apply general international law in its internal dealings with the Member States. In other words, precisely because primary law is treaty law, it may well derogate from general international law in the relations among Member States *inter se* and between the EU and the Member States.<sup>95</sup>

In this regard, former ICJ Judge *Bruno Simma* raised the question whether European Union law, as a 'subsystem' of public international law,<sup>96</sup> and its remedies in the form of obligatory judicial dispute settlement procedures with binding decisions, definitely excludes international measures of self-help, such as countermeasures, between Member States *inter se* and between Member States and the Union, or whether there is the chance of an exceptional 'fall-back' on general international law. He also asked to which extent EU law can be considered 'self-contained' in the meaning that the Union alone can claim the right to react to violations of EU law and thus bar aggrieved Member States from hearkening back to the general norms of internationally wrongful acts. Lastly, *Simma* also wonders whether the principle of residual application of general international law to international organisations as enshrined in Article 5 VCLT is thus also valid for State

<sup>95</sup> *Gianelli* (note 5), 96.

<sup>96</sup> *Axel Marschik*, Subsysteme im Völkerrecht: Ist die Europäische Union ein „Self-Contained Regime“? (1997), 193 *et seq.*

responsibility.<sup>97</sup> In other words, one could equally enquire whether the autonomous EU system either provides for an exhaustive list of remedies which does not permit any subsidiary recourse to general international law; or whether Union law, as a quasi-‘ancillary’ legal order of public international law allows for the application of countermeasures under the general rules of State responsibility<sup>98</sup> by Member States against other Member States when breaching EU law.<sup>99</sup>

At the outset, it should be analysed whether the European Union’s legal order is in fact a ‘self-contained regime’ which only allows for the application of an exhaustive and definite list of secondary rules, and thus excludes the fall-back to the general rules of internationally wrongful acts.<sup>100</sup> Without doubt, EU law contains primary rules, governing the rights and duties of the Union, the Member States and individuals within the scope of EU law, and certain secondary rules, which guarantee the enforcement of primary rules. If the EU is an ‘open subsystem’ of international law, general secondary rules may well be applied in order to enforce EU primary rules; if the EU, on the other hand, is a ‘closed subsystem,’ Union law is entirely uncoupled from general international law and thus its set of secondary rules<sup>101</sup> may well foresee its possible abuse by Member States and hence “specif[y] the means at the disposal of the [...] State[s] to counter any such abuse.”<sup>102</sup> Suitable candidates for an EU set of secondary rules are (1) proceedings before the Luxembourg Court, *in concreto* infringement proceedings under Article 258 TFEU and Article 259 TFEU; (2) secondary legislation redressing breaches of Union law; (3) the direct effect of EU law before domestic courts; and (4) the proceedings under Article 7 TEU to act if a Member State violates the values enshrined in Article 2 TEU, *i.e.* human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.<sup>103</sup> In

<sup>97</sup> Bruno Simma, Self-Contained Regimes, Netherlands Yearbook of International Law 16 (1985), 111, 123.

<sup>98</sup> Cf. Arts. 49 *et seq.* ILC Articles on the Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Sess., Suppl. 10, 43 *et seq.*

<sup>99</sup> Frank Schorkopf, Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich: Möglichkeiten und Grenzen einer „streitbaren Demokratie“ auf europäischer Ebene (2002), 69.

<sup>100</sup> Simma (note 97), 117.

<sup>101</sup> Schorkopf (note 99), 70.

<sup>102</sup> ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment of 24 May 1980, ICJ Reports 1980, 3, para. 86.

<sup>103</sup> Simma (note 97), 125.

particular (1) and (4), proceedings before the CJEU and proceedings under Article 7 TEU, respectively, merit special consideration and will therefore be discussed in the following paragraphs. The instrument of State liability as developed by the CJEU in cases such as *Francovich*<sup>104</sup> and *Brasserie du Pêcheur*<sup>105</sup> will not be examined at this point, since it does not represent a comprehensive dispute settlement procedure under EU law of its own. In fact, if a Member State refused to provide a remedy as required by *Francovich*, the EU or the other Member States would then bring an action for failure to act (under Article 258 or 259 TFEU) or instigate proceedings under Article 7 TEU in order to redress this issue.<sup>106</sup>

### 1. *Infringement Proceedings*

The first aspect to be explored is infringement proceedings as a very effective and sophisticated set of secondary rules. The CJEU had to deal with the relationship between the internal enforcement of EU law and general international law for the first time when Luxembourg and Belgium pleaded that the international rules of State responsibility allowed a Member State, when aggrieved by the failure of another Member State to perform its obligations, to withhold performance of its own. The defendant States argued that, in such a case, the Commission would lose its right to instigate infringement proceedings before the Court.<sup>107</sup> The CJEU decided, however, that EU primary law is not merely

limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it. Therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that *the Member States shall not take the*

<sup>104</sup> ECJ, Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifazi v. Italy*, 1991 ECR I-5357.

<sup>105</sup> ECJ, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and Others*, 1996 ECR I-1029.

<sup>106</sup> *Gerard Conway*, Breaches of EC Law and the International Responsibility of Member States, *European Journal of International Law (EJIL)* 13 (2002), 679, 688–689.

<sup>107</sup> ECJ, Joined Cases 90/63 and 91/63, *Commission v. Luxembourg and Belgium*, 1964 ECR 625, 631.

*law into their own hands.* Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs.<sup>108</sup>

The CJEU continued to emphasise the departure which infringement proceedings represented from the traditional dispute settlement mechanisms of international law<sup>109</sup> and held that the advantages the Member States took from being part of the Union also imposed on them the obligation to respect its rules,<sup>110</sup> which also includes the EU's compulsory rules on dispute settlement. Moreover, the Court confirmed this approach in the *Mutton and Lamb* case and ruled that the Member States are prohibited from unilaterally adopting corrective measures on their own authority to prevent any failure by other Member States to comply with EU law.<sup>111</sup> This means, in a nutshell, that Member States affected by an alleged breach of Union law by another Member State must submit their case to the Luxembourg Court in accordance with Article 259 TFEU, and that they must not resort to the unilateral application of countermeasures under international law.

This approach conforms to the rule set forth in Article 344 TFEU and thus the Member States' obligation not to submit disputes regarding the interpretation or application of EU law to any court other than the CJEU.<sup>112</sup> Both with regard to unilateral actions under general international law and to judicial dispute settlement, the Luxembourg Court claims absolute and exclusive jurisdiction in order to maintain the autonomy of EU law.<sup>113</sup>

In this light, it was a prudent manoeuvre of Hungary to submit a bilateral dispute with Slovakia to the Luxembourg Court before hearkening back to unilateral measures under international law. Although the CJEU eventually ruled that Slovakia's refusal to allow the Hungarian President access to Slovakian territory was not in violation of Union law (as the Member States' right to control the access of a

<sup>108</sup> *Ibid.* (emphasis added).

<sup>109</sup> Anthony Arnall, *The European Union and its Court of Justice* (2nd ed. 2006), 44.

<sup>110</sup> ECJ, Case 39/72, *Commission v. Italy (Premiums for Slaughtering Cows)*, 1973 ECR 101, para. 24.

<sup>111</sup> ECJ, Case 232/78, *Commission v. France (Mutton and Lamb)*, 1979 ECR 2729, para. 9.

<sup>112</sup> *Cf.* in this respect the seminal judgment ECJ, Case C-459/03, *Commission v. Ireland (Mox Plant)*, 2006 ECR I-4635.

<sup>113</sup> *Cf.* also Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (2013), 19–49.

foreign head of State to their territory is governed by customary international law and international conventions, and not the principle of free movement under Article 21 TFEU),<sup>114</sup> any myopic unilateral measure on the part of Hungary, without prior clarification by the Luxembourg Court, could have violated the aforementioned principle of exclusive jurisdiction of Article 344 TFEU. Such a move could have resulted in infringement proceedings by the Commission under Article 258 TFEU.<sup>115</sup> General Advocate *Yves Bot* also noted that any dispute on the interpretation and application of Union citizenship and free movement rights should be dealt with by the Luxembourg Court “by means of one of the procedures provided for in [the Treaties], in this case Article 259 TFEU.”<sup>116</sup>

Should the CJEU in the end decide that a Member State is in fact responsible for a violation of Union law, the convicted Member State must certainly comply with the judgment. In the event of non-compliance, the Commission may bring the case before the Court, which may impose a lump-sum or penalty payment on the defaulting Member State if it has in fact not complied with the previous judgment (Article 260 (2) TFEU).<sup>117</sup> The mechanism under Article 260 (2) TFEU thus plainly constitutes “the sharp end of the overall enforcement procedure [...]”<sup>118</sup>

Yet, the EU Treaties remain silent on the question which legal consequences another act of non-compliance – this time the second judgment, confirming the breach of EU law by not complying with the first judgment – would entail. Certain international lawyers argue that measures of reprisal or an *exceptio non adimpleti contractus* within the meaning of Article 60 VCLT would not be admissible in order to react to a violation of Union law by a Member State;<sup>119</sup> others, however, assume

<sup>114</sup> ECJ, Case C-364/10, *Hungary v. Slovakia*, paras. 34 and 52, available via: <http://curia.europa.eu/juris/liste.jsf?num=C-364/10> (accessed on 3 March 2015).

<sup>115</sup> *Ibid.*, para. 23.

<sup>116</sup> ECJ, Case C-364/10, *Hungary v. Slovakia*, Opinion of Advocate General (AG) *Bot*, para. 47, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=120050&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=273405> (accessed on 11 March 2015).

<sup>117</sup> ECJ, Case C-387/97, *Commission v. Greece (Failure by a Member State to fulfil its obligations)*, 2000 ECR I-5047.

<sup>118</sup> *Paul Craig/Gráinne de Búrca*, *EU Law: Text, Cases, and Materials* (2011), 438.

<sup>119</sup> *Conway* (note 106), 693; *Simma* (note 97), 126; *Jürgen Schwarze*, *Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen*, *Europarecht* (EuR) 18 (1983), 1 *et seq.*; *Ulrich*



that the application of measures under international law to enforce European Union law are permissible, but only after the local remedies of the 'subsystem' EU have been exhausted<sup>120</sup> or if the EU judicial system has proved entirely ineffective in a given situation.<sup>121</sup> Such measures therefore represent the last resort to guarantee the effectiveness of Union law, which must certainly comply with the strict rules of State responsibility, *i.e.* reprisals (or countermeasures, to use the modern term) must be applied proportionally and short of the use of force.<sup>122</sup> Beyond that, the general rules on State responsibility are hence merely residually applicable.<sup>123</sup> The case of *Hungary v. Slovakia* proves that if there is a dispute between Member States concerning the interpretation of EU law, the CJEU claims full jurisdiction, even if, at the end of the day, the substantive scope of the dispute lies outside Union law.<sup>124</sup> And although the *Kadi* cases did not involve questions of State responsibility or a dispute between Member States, the Luxembourg Court clearly conveyed to Member States such as the United Kingdom (which would have preferred to see the EU act in question on combating terrorism<sup>125</sup> not being invalidated)<sup>126</sup> that if international law is not

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*Everling*, Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge? Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht, in: Rudolf Bernhardt *et al.* (eds.), Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler (1983), 173, 173 *et seq.*

<sup>120</sup> *Michael Smith*, The European Union and International Order: European and Global Dimensions, *European Foreign Affairs Review* 12 (2007), 437, 440; *Albert Bleckmann*, Die Rechtsnatur des Europäischen Gemeinschaftsrechts: zur Anwendbarkeit des Völkerrechts im Europäischen Rechtsraum, *Die Öffentliche Verwaltung (DÖV)* 31 (1978), 391, 393–394; *Hubertus A. H. Audretsch*, Supervision in European Community Law: Observance by the Member States of their Treaty Obligations (1986), 138–146; *Torsten Stein*, Die regionale Durchsetzung völkerrechtlicher Verpflichtungen: Europa, *ZaöRV* 47 (1987), 95, 108.

<sup>121</sup> *Bruno de Witte*, European Union Law: How Autonomous is its Legal Order?, *Zeitschrift für Öffentliches Recht (ZÖR)* 65 (2010), 141, 152.

<sup>122</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, ICJ Reports 1986, 392, para. 249, and Art. 50 (1)(a) Articles on the Responsibility of States for Internationally Wrongful Acts.

<sup>123</sup> *Bruno Simma/Dirk Pulkowski*, Of Planets and the Universe: Self-contained Regimes in International Law, *EJIL* 17 (2006), 483, 516.

<sup>124</sup> Which, of course, raises the question why the Court did not find the case inadmissible at the outset, if the position of heads of States is regulated by international law, and Slovakia did not apply EU law; cf. *Tamas Vince Adány*, International Law at the European Court of Justice: A Self-Contained Regime or an Escher Triangle, *Hungarian Yearbook of International Law* 1 (2013), 165, 179.

<sup>125</sup> Council Regulation (EC) No. 881/2002 of 27 May 2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida

capable of protecting individual rights in the way Union law is, the former has to give way to the latter. In the light of these findings, concerns about a potential ‘barbarisation’ of the relations between the EU Member States through a potential fall-back to the rules of general international law seem unjustified.<sup>127</sup>

## *2. Serious Breaches of Fundamental Values and Article 7 TEU Proceedings*

The second aspect to be discussed at this point are proceedings under Article 7 TEU, which allow, after consultations, hearings, and the submission of observations, for the suspension of voting rights of a Member State in the Council, if the Member State in question allegedly acts in contravention of the values referred to in Article 2 TEU.<sup>128</sup> Proceedings under Article 7 TEU bear closer resemblance to classical dispute settlement procedures under public international law, which are also used by other international organisations<sup>129</sup> to respond to grave violations of values shared among the members of these organisations.<sup>130</sup> The question remains, however, whether Article 7 TEU contains exhaustive provisions on dispute settlement, which thence enjoins the Union and the Member States from hearkening back to the general rules of international law, or whether such a fall-back may be admissible in case the relevant provisions of EU law fail to bring about a viable solution.<sup>131</sup>

The first potential evidence hinting at the exclusiveness of Article 7 TEU is the comprehensive modification to the said provision brought about by the Nice

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network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 of 29 May 2002 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ 2002 L 139, 9.

<sup>126</sup> Appeal brought on 16 December 2010 by the United Kingdom of Great Britain and Northern Ireland against the judgment of the General Court (Seventh Chamber) delivered on 30 September 2010 in Case T-85/09, *Yassin Abdullah Kadi v. European Commission* (Case C-595/10 P), OJ 2011 C 72, 10.

<sup>127</sup> *Marschik* (note 96), 289, para. 86.

<sup>128</sup> These values are the respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities.

<sup>129</sup> Cf., e.g., Art. 6 Charter of the United Nations, 26 June 1945, UNCIO 15, 335; Art. 8 Statute of the Council of Europe, 5 May 1949, ETS No. 001; or Art. 30 Constitutive Act of the African Union, 11 July 2000, UNTS 2158, 3.

<sup>130</sup> *Matthias Ruffert*, Art. 7 EUV, in: Calliess/Ruffert (eds.) (note 81), para. 1.

<sup>131</sup> *Schorkopf* (note 99), 68–69.

Treaty<sup>132</sup> which renders it more precise than in the Treaty of Amsterdam,<sup>133</sup> its predecessor.<sup>134</sup> The Lisbon Treaty all the more enshrines Article 7 TEU in Part I of the Treaty on European Union and therewith as a ‘constitutional core provision’ of EU law.<sup>135</sup> Proponents of the exclusive character of Article 7 TEU additionally argue that the bilateral countermeasures of the (at that time) fourteen other EU Member States against Austria in 2000<sup>136</sup> on the basis of general international law,<sup>137</sup> *i.e.* the refusal to meet with the Austrian delegates on a bilateral basis and to deny them access to EU meetings in order to protest against the admission of a right-wing party into a coalition government, were clearly in violation of Union law and thus impermissible.<sup>138</sup> This deliberate circumvention of the relevant provisions of EU law was therefore also in contravention of the general principles of law, as enshrined in Article 38 (1)(c) Statute of the International Court of Justice<sup>139</sup>.<sup>140</sup> Beyond that, European Union law clearly lacks any interconnection between the breach of Union values by one Member State and bilateral sanctions by the other, non-defaulting, Member States. This approach also underlines the Union’s role in providing assistance to maintain democratic institutions or fundamental rights through

<sup>132</sup> Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Union and Certain Related Acts, 26 February 2001, OJ 2001 C 80, 1.

<sup>133</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, OJ 1997 C 340, 1.

<sup>134</sup> *Gráinne de Búrca*, The Evolution of EU Human Rights Law, in: Paul Craig/Gráinne de Búrca (eds.), *The Evolution of EU Law* (2nd ed. 2011), 465, 484.

<sup>135</sup> *Ruffert* (note 130), para. 31.

<sup>136</sup> See Statement from the Portuguese Presidency of the European Union on Behalf of XIV Member States, 31 January 2000, available at: <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=Ng8KStTVk5CvsXhnJGcm4q8Rry89P6cT8bs35h08fhpvFPssDYGc!1615003456?docId=84237&cardId=84237> (accessed on 15 January 2015).

<sup>137</sup> *Katrin Träbert*, Sanktionen der Europäischen Union gegen ihre Mitgliedstaaten: Die Sanktionsverfahren nach Art. 228 Abs. 2 EGV und Art. 7 EUV (2010), 226.

<sup>138</sup> *Michael Merlingen/Cas Mudde/Ulrich Sedelmeier*, The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria, *Journal of Common Market Studies* 39 (2001), 59, 66–67; *Andrew Williams*, The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK’s Invasion of Iraq, *European Law Review* 31 (2006), 3, 7–10 and 25; and *Wojciech Sadurski*, Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider, *Columbia Journal of European Law* 16 (2010), 385, 385.

<sup>139</sup> Statute of the International Court of Justice, 26 June 1945, UNCIO 15, 355.

<sup>140</sup> *Ludwig Adamovich*, Juristische Aspekte der „Sanktionen“ der EU-14 und des „Weisenberichtes“, *Europäische Grundrechte-Zeitschrift* 28 (2001), 89, 90.

recommendations under Article 7 TEU if such fundamental values are threatened within a State.<sup>141</sup> As a consequence, if there is no breach of these values, there is also no basis for sanctions under general international law.<sup>142</sup>

Another argument for the exclusiveness of Article 7 TEU proceedings states that the Member States do not have the competence to enact countermeasures *inter se* for serious violations of human rights and the rule of law, since the concrete course of action for doing so is already governed by EU law. Consequently, minor breaches not amounting to the threshold of severity under Article 7 TEU must also be dealt with by the instruments provided for by the Treaties, such as the aforementioned infringement proceedings under Articles 258 or 259 TFEU, whereas unilateral reprisals are thus considered impermissible.<sup>143</sup>

The view contrary to the exclusiveness theory holds that Article 7 TEU does not exclusively govern the law of sanctions between EU Member States, as this provision does not invest the Union with the exclusive competence to sanction Member States acting in violation of the EU's fundamental values. Such exclusivity would furthermore not only entail the complete and utter loss of this competence on part of the Member States, but it would also prove to be practically futile, as the Union is entitled to act under Article 7 TEU even in those cases in which a Member State has violated the Union's values *outside* the scope of EU law.<sup>144</sup> In other words, a Member State may also breach these values and the EU's principle of homogeneity by acting without any relation to Union law whatsoever, since the values of Article 2 TEU represent a fundamental European catalogue of common and shared values among the Member States.<sup>145</sup> Furthermore, it is also manifest that the European Union does

<sup>141</sup> *De Búrca* (note 134) 470.

<sup>142</sup> *Heribert Franz Köck/Margit Hintersteiner*, Zu den Sanktionen der vierzehn EU-Partnerstaaten gegen Österreich, in: Erhard Busek/Martin Schauer (eds.), *Eine europäische Erregung: Die „Sanktionen“ der Vierzehn gegen Österreich im Jahr 2000* (2003), 317, 342–343; *Heribert Franz Köck*, Die Maßnahmen der EU-14 gegen Österreich, in: Konrad Ginther *et al.* (eds.), *Völker- und Europarecht: 25. Österreichischer Völkerrechtstag* (2001), 109, 115–116.

<sup>143</sup> *Schorkopf* (note 99), 72.

<sup>144</sup> *Stefanie Schmahl*, Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett: Eine europa- und völkerrechtliche Analyse, *EuR* 35 (2000), 819, 832–833.

<sup>145</sup> *Ibid.*, 821, and *Frank Schorkopf*, Homogenität in der Europäischen Union: Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV (2000), 69.

not have any competence to govern the relations between the Member States *inter se*, as it is the Member States' sovereign right to determine the scope of bilateral relations with their European neighbours. Although Article 7 TEU contains an exhaustive list of sanctions, there is no evidence that the Member States have in fact lost the competence to enact sanctions against each other.<sup>146</sup> The Member States of the European Union could, for instance, impose unilateral countermeasures against each other in case they violated a fundamental principle not mentioned in Article 2 TEU, or if the breach does not reach the minimum level of severity as required by Article 7 TEU.<sup>147</sup> It is also evident that the EU does not have exclusive competence for imposing preliminary measures below the threshold of Article 7 TEU, since there is no legal basis for such competence in the Treaties, nor did the Council pass any respective legislation based on Article 7 TEU. Yet, as the former alternative would require Treaty amendments and the latter option would fail due to the lack of the Council's power to legislate on the basis of Article 7 TEU, the Member States may impose such sanctions as preliminary measures against each other according to the rules of general international law.<sup>148</sup>

Since the 'nuclear option'<sup>149</sup> of Article 7 TEU has never been applied in practice,<sup>150</sup> there is no telling whether these proceedings are sufficient to react to serious breaches of EU values, or whether the Union and the other Member States cannot help but falling back to the general rules of international law to properly react in emergency situations. In a nutshell, however, it can be seen that mere political disagreements do

<sup>146</sup> *Christian Busse*, Österreich contra Europäische Union: Eine rechtliche Beurteilung der Reaktionen der EU und ihrer Mitgliedstaaten auf die Regierungsbeteiligung der FPÖ in Österreich (2000), 21–22 and 27–28.

<sup>147</sup> *Franz Leidenmühler*, Zur Legalität der Maßnahmen gegen die österreichische Bundesregierung – Rechtsfragen aus Anlass der internationalen Reaktionen auf die Regierungsbildung eines Mitgliedstaates der EU, ZÖR 55 (2000), 299, 312.

<sup>148</sup> *Waldemar Hummer/Walter Obwexer*, Die Wahrung der „Verfassungsgrundsätze“ der EU – Rechtsfragen der „EU-Sanktionen“ gegen Österreich, Europäische Zeitschrift für Wirtschaftsrecht 11 (2000), 485, 489.

<sup>149</sup> Cf., e.g., *Lauri Bode-Kirchhoff*, Why the Road from Luxembourg to Strasbourg Leads through Venice: The Venice Commission as a Link between the EU and the ECHR, in: Kanstantsin Dzehtsiarou *et al.* (eds.), Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR (2014), 55, 68.

<sup>150</sup> *Williams* (note 138), 27, who argues that the use of Art. 7 proceedings “[...] would be catastrophic. Even its possible application would set in train disastrous events that might undo the very fabric of the Union”.

not constitute serious breaches of the values enshrined in Article 2 TEU and therefore cannot result in proceedings under Article 7 TEU. This provision can consequently be considered an exhaustive list of measures which may be applied to bring defaulting Member States back in line with the principles of European Union law. This means that the EU Member States asserted rights which do not exist under EU law when they imposed bilateral sanctions against Austria in 2000 and therefore potentially violated the Union's legal order themselves.<sup>151</sup> Today the majority view is that these sanctions, especially the refusal to grant the Austrian delegates access to EU consultations, were illegal and impermissible under EU law<sup>152</sup> (yet certainly legal under international law),<sup>153</sup> and, if such a case were to occur again under the current legal conditions, proceedings under Article 7 TEU would have to be pursued in any event.

One could consequently assume that nowadays, after the CJEU has extensively corroborated its exclusive jurisdiction in cases such as *Mox Plant*,<sup>154</sup> the Member States would thus be obliged to await the results of Article 7 TEU procedures and then – in case they should fail – call upon the Luxembourg Court to settle such disputes before resorting to bilateral countermeasures. Even though the Court may rule that the principles violated by the Member State in question are not within the ambit of EU law, as it recently did in the *Hungary v. Slovakia* case,<sup>155</sup> Article 344 TFEU nevertheless commits the Member States not to submit disputes to any other court or tribunal than the Union courts. The only exception remain cases where there is absolutely no doubt that the dispute in question does not even remotely touch upon Union law, as for instance in the *Jurisdictional Immunities* case.<sup>156</sup> Finally, the increasingly negative fundamental rights situation in Hungary since 2011

<sup>151</sup> Bruno de Witte/Gabriel N. Toggenburg, Human Rights and Membership of the European Union, in: Steve Peers/Angela Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law, and Policy* (2004), 59, 77.

<sup>152</sup> Adamovich (note 140), 90; Ruffert (note 130), para. 33; Sadurski (note 138), 401–405; Schorkopf (note 99), 68 *et seq.*

<sup>153</sup> Matthew Happold, Fourteen against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government, *International and Comparative Law Quarterly* 49 (2000), 953, 962.

<sup>154</sup> ECJ, *Mox Plant* (note 112).

<sup>155</sup> *Id.*, *Hungary v. Slovakia* (note 114), paras. 34 and 52.

<sup>156</sup> ICJ, *Jurisdictional Immunities of the State* (note 67).

demonstrates that general international law is not even considered to bolster the possibility of unilateral or stronger methods of Treaty enforcement. In fact, infringement proceedings instigated by the Commission against Hungary,<sup>157</sup> and the European Parliament's "Tavares Report"<sup>158</sup> emphasise that the EU institutions and the Member States try to use all the methods provided for in the Treaties to pressure Hungary into conforming with EU fundamental rights. In conclusion, recourse to general international law in order to bring defaulting Member States 'back in line' with Union law hence also seems to be a mere hypothetical possibility without any real chance of transpiring.

### 3. *Expulsion of EU Member States*

The question remains what the Member States should do with another Member State which continues to breach the principles of Union law, even after they have – unsuccessfully – initiated proceedings under Article 7 TEU as well as infringement proceedings under Article 259 TFEU (or Article 258 TFEU if they have asked the Commission to intervene). Despite the Euro crisis and some populist calls for the expulsion of deeply indebted Member States such as Greece from the Union, the actual expulsion of a Member State certainly appears to be a merely hypothetical question which will most likely not transpire in reality. We should nevertheless carry this thought a little further, just out of academic curiosity and for the sake of argumentative completeness.

If the Member States ponder over the step of expelling a defaulting Member State, it is clear that they must first 'exhaust the domestic remedies' of EU law, *i.e.* the abovementioned proceedings (Article 7 TEU and/or infringement proceedings).<sup>159</sup> Since there is no explicit provision in the Treaties allowing for the expulsion of

<sup>157</sup> *Cf., e.g.,* ECJ, Case C-288/12, *Commission v. Hungary (Data Protection)*, Judgment of 8 April 2014, not yet reported, OJ 2014 C 175, 6.

<sup>158</sup> European Parliament, Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130/(INI)), 24 June 2013, A7-0229/2013, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0229+0+DOC+PDF+V0//EN> (accessed on 15 January 2015).

<sup>159</sup> *Oliver Dörr*, Art. 50 EUV, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds.), *Das Recht der Europäischen Union: EUV/AEUV* (2014), para. 46.

Member States,<sup>160</sup> the Member States may then fall back on the general rules of international law<sup>161</sup> as a sort of *remedium ultimum*,<sup>162</sup> after the procedural steps of EU law have failed. This assumption in turn raises the question on which concrete international norms the Member States could rely to expel a 'pariah' among them. At the outset, the remaining Member States need to pursue this course of action unanimously,<sup>163</sup> before they may hearken back to the relevant provisions of the VCLT – albeit only in analogous fashion *via* its concurrent existence as customary international law, as Article 4 VCLT does not allow for the retroactive application of the Convention,<sup>164</sup> and the EU Member States France and Romania have, so far, decided not to ratify it.

Since Article 5 VCLT (or rather its counterpart in customary international law)<sup>165</sup> allows for the application of the Convention to the constituent treaties of an international organisation and therewith to the EU Treaties, a potential candidate norm for the expulsion of a Member State could be Article 60 (2)(a) VCLT,<sup>166</sup> which is considered a codification of customary international law.<sup>167</sup> Should a contracting party be in material breach of a multilateral treaty, Article 60 (2)(a) VCLT allows for the suspension of this treaty between the defaulting contracting State and the other parties. Sceptics may argue, however, that this provision is not applicable, as Article 60 (4) VCLT establishes the rules of Article 60 VCLT as residuary norms *vis-à-vis* any *leges speciales* of the treaty applicable in the event of a breach. Proceedings under

<sup>160</sup> Cf. for an extensive analysis on the lack of such a provision *Phoebus Athanassiou*, Withdrawal and Expulsion from the EU and EMU: Some Reflections, European Central Bank Legal Working Paper Series, No. 10 (2009), 1, 32–36.

<sup>161</sup> *Ruffert* (note 130), para. 31.

<sup>162</sup> *Friedemann Götting*, Die Beendigung der Mitgliedschaft in der Europäischen Union (2000), 151, para. 9.

<sup>163</sup> *Henri de Waele*, The European Union on the Road to a New Legal Order – The Changing Legality of Member State Withdrawal, *Tilburg Foreign Law Review* 12 (2004), 169, 185.

<sup>164</sup> *Schmahl* (note 144), 829. Given that the VCLT entered into force in 1980, it would thus retroactively apply to those Member States who have joined the EU prior to this date.

<sup>165</sup> *Aust* (note 86), 394.

<sup>166</sup> *Schmahl* (note 144), 829; *Simma* (note 97), 128; and *Manfred Zuleeg*, Der Bestand der Europäischen Gemeinschaft, in: Roland Bieber/Albert Bleckmann/Francesco Capotorti (eds.), *Das Europa der zweiten Generation: Gedächtnisschrift für Christoph Sasse*, Vol. 1 (1981), 55, 62–63.

<sup>167</sup> ICJ, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, 7, para. 46.



Article 7 TEU possibly constitute special proceedings under Article 60 (4) VCLT and would therefore bar the application of Article 60 (2)(a) VCLT and the general rules of international law.<sup>168</sup>

Yet, international lawyers counter this argument by referring to the wording of Article 7 (3) TEU which only allows for the *suspension* of certain rights “deriving from the application of the Treaties to the Member State in question, including the *voting rights* of the representative of the government of that Member State in the Council” (emphasis added). This means that, firstly, only certain rights of a defaulting Member State can be suspended, but not the membership itself, and secondly, that Article 7 TEU does not contain an exhaustive list of any contrivable sanction against defaulting Member States in the event of serious breaches.<sup>169</sup> We might therefore conclude that Article 7 TEU is not a *lex specialis* within the meaning of Article 60 (4) VCLT and does therefore not foreclose the use and application of the general rules of international law (for instance the customary rules of Article 60 (2)(a) VCLT) in order to expel Member States for serious breaches of European Union law. But again, from the perspective of political reality, the expulsion of an EU Member State is a mere academic thought experiment which is very unlikely to occur in practice.

#### IV. Conclusion: “*Si Tacuisses ...*”?

It seems appropriate to conclude this contribution with a proverb. The approach which the drafters of the Lisbon Treaty obviously followed when formulating the new provisions in both Article 3 (5) TEU and Article 21 TEU, appears to mirror *Boethius*’ advice “*Si tacuisses, philosophus mansisses.*”<sup>170</sup> Although these two provisions clearly express the Union’s commitment to upholding international law *vis-à-vis* the outside world and insinuate an innovative and courageous acceptance of public

<sup>168</sup> *Thomas Giegerich*, Article 60, in: Dörr/Schmalenbach (eds.) (note 74), para. 70.

<sup>169</sup> *Schmahl* (note 144), 830.

<sup>170</sup> *Boethius*, *The Consolation of Philosophy* (reprint, 2008), 36: “So now at last do you realize that I am a philosopher?” Whereupon the first man biting answered: ‘I should have known it, if you had kept your mouth shut’.

international law in the EU legal order,<sup>171</sup> they fall short of being proper incorporation clauses, which can usually be found in State constitutions. It seems that this silence is not due to a limited relevance or to the lack of interest by the European Union in the international legal system. It rather appears that the drafters of the EU Treaties were aware of the effect the explicit recognition of the relation between general international norms and the Treaties might have on the very fabric of the EU system, as this recognition could erode the Treaties' character as founding 'constitutional' instruments and therewith threaten the Union's establishment as a quasi-domestic legal order, which is intended to remain distinct from the rules of international law.<sup>172</sup>

This certainly leaves a bitter taste in the mouths of legal theorists who are hence prevented from finding clear and unambiguous models of classifying the EU's relationship with international law. A straightforward provision on how general international law is to be implemented within Union law would unquestionably be helpful in order to overcome the current confused practice of the Court which appears to be oscillating between monism and dualism.<sup>173</sup> In practice and aside from any speculations, however, the CJEU has in fact accepted that the general rules of international law are binding on the Union and that they form part of the EU legal order, which means that these rules are nowadays incorporated on a traceable case-by-case basis, and not in their entirety as the whole set of customary international law. The judgment in *Racke*, which serves as a judicial substitution of such an incorporation clause, proves that a codified incorporation clause is not absolutely necessary in order to give effect to general international law in a 'domestic' setting. Yet, with respect to the normative hierarchy of EU law and the way the CJEU has decided certain landmark cases (in particular the *Kadi* saga), it may, nonetheless, have been a wise choice to follow *Boethius*' saying and to keep quiet on this matter and not to include a provision on the status of general international law within the EU's legal order, as this might have further complicated matters and bereft the Court of its flexibility, especially when it comes to the protection of fundamental rights.

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<sup>171</sup> *Theodore Konstadinides*, When in Europe: Customary International Law and EU Competence in the Sphere of External Action, *German Law Journal* 13 (2012), 1177, 1180.

<sup>172</sup> *Gianelli* (note 5), 97.

<sup>173</sup> *Beatrice I. Bonafé*, *International Law in Domestic and Supranational Settings* (2014), 378, 389.

With respect to the functions of general international law in EU law, the European Union's legal order represents – to a certain extent – a self-contained regime under international law, whose Member States are free to rely on the rules of general international law in their dealings with each other *outside* the ambit and scope of European Union law, as the *Hungary v. Slovakia* case<sup>174</sup> demonstrated. It is, however, impermissible for them to initially resort back to these rules when EU law is involved in a dispute. In this case the Member States are required to first exhaust the 'domestic' remedies of the Treaties before they may impose sanctions under international law against one another.

This *theoretically* means that the Member States may fall back to the general rules of the international legal system after all remedies provided for by Union law have been exhausted without any positive results. In other words, not even the highly specialised and integrated EU system has completely been 'decoupled' from the *leges generales* of international law.<sup>175</sup> Metaphorically speaking, the law of the European Union may have left the uterus of its 'maternal' legal order, *i.e.* public international law, but it seems that the umbilical cord has not been entirely cut. *Simma* concludes that the profound opposition of EU lawyers against the residual application of international law appears predominantly to be based on the fear that "the more highly integrated [EU] legal order could otherwise be 'infected' by the more 'primitive' international law processes of auto-determination and self-help."<sup>176</sup>

Of course, on the other hand, one could also raise the question whether there still is, in practice, a need for the residual application of international norms when rules and remedies under EU law are both comprehensive and in fact very effective.<sup>177</sup> If the need for Treaty amendments arises, the Member States rather meticulously follow the procedures set out by the EU Treaties. And even if certain Member States, for political or fiscal reasons, refuse to integrate instruments such as the European Stability Mechanism (ESM) and the Fiscal Compact in primary Union law,<sup>178</sup> and

<sup>174</sup> ECJ, *Hungary v. Slovakia* (note 114).

<sup>175</sup> *Simma* (note 97), 128–129.

<sup>176</sup> *Ibid.*, 127.

<sup>177</sup> *Simma/Pulkowski* (note 123), 516–517.

<sup>178</sup> European Council, Statement by the Euro Heads of State or Government, 9 December 2011, 7, available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/126658.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf)

prefer to conclude international agreements to achieve this end, this does not subvert the EU legal order. On the contrary, as the CJEU confirmed in the *Pringle* case, Article 273 TFEU in conjunction with Article 373 (3) ESM Treaty<sup>179</sup> entrusts the Court with the jurisdiction to interpret and apply the provisions of this very treaty in a binding manner.<sup>180</sup> Therefore it can always counteract any subsequent Member State practice potentially in contravention to the EU Treaties in this context.

Moreover, the Union's legal order provides for highly sophisticated and elaborate enforcement mechanisms which, in principle, do not require the application of the more general norms of international law. Particularly the two instruments of infringement proceedings and proceedings under Article 7 TEU constitute the Union's backbone to 'seal off' EU law as a regional subsystem of the international legal order and therewith to eliminate any reason to hearken back to the general rules of public international law.<sup>181</sup> *Practically*, this finding entails that the silence of the Treaties appears to be irrelevant in this respect, because not even the drafters' 'negligence' in this regard proved an effective means to cut the ties between European Union and public international law. Yet, at the end of the day, there is the – admittedly unlikely – possibility that the European Union's enforcement mechanisms fail and that the more general toolbox of customary international law needs to be re-opened once again. *In extremis*, recourse to these rules cannot be absolutely excluded.<sup>182</sup>

This means, in conclusion, that even though the silence of the Treaties on the functions of general international law within Union law does not make a difference with respect to a potential recourse to the subsidiary international rules and thus the autonomy of EU law, it can be hypothesised that a provision on the implementation of general international law could have a certain impact on the Court's flexibility when dealing with international norms. Thus, the Union may not have exactly

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(accessed on 15 January 2015).

<sup>179</sup> Treaty Establishing the European Stability Mechanism, 2 February 2012, available *via*: <http://esm.europa.eu/> (accessed on 15 January 2015).

<sup>180</sup> ECJ, Case C-370/12, *Thomas Pringle v. Ireland*, paras. 170–177, available *via*: <http://curia.europa.eu/juris/liste.jsf?num=C-370/12> (accessed on 3 March 2015).

<sup>181</sup> *Conway* (note 106), 688.

<sup>182</sup> *Ibid.*, 682–683.

remained a philosopher in the meaning of *Boethius*' words, but at the very least a functioning supranational organisation *sui generis*.